IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. ~~1125~~ 81

CLARENCE WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is set forth in Appendix A, Pages 22 to 28, reported in 418 F.2d 159.

JURISDICTION

The judgment of the panel of the Court of Appeals, affirming the conviction of Petitioner CLARENCE WILLIAMS, was entered on October 17, 1969. The petition for rehearing enbanc was denied on December 24, 1969. A petition for writ of certiorari was filed on January 26, 1970, and was granted by this Court on March 23, 1970. Jurisdiction of this Court lies under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in the persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

QUESTIONS PRESENTED

1. Whether *Chimel vs. California,* 395 U.S. 752, should be applied retroactively, at least on direct review of a Federal criminal conviction not yet final at the time the *Chimel* decision was handed down.

2. Whether, assuming that *Chimel* does not apply in this case, the search was nevertheless void on the grounds that it was not properly incident to an arrest since the arrest was a mere pretext to carry out a general and exploratory search incidental to the arrest.

STATEMENT

On March 31, 1967, at approximately 12:15 o'clock a.m., Federal, State and City narcotics Officers entered a private residence at 1402 East Granada, in the City of Phoenix, Arizona (Transcript of Trial Proceedings* page 12), allegedly for the purpose of arresting Petitioner CLARENCE WILLIAMS. Approximately nine officers were present (TTP 13;47). The stated purpose of the officers was to arrest Petitioner CLARENCE WILLIAMS for a crime he allegedly committed prior to March 31, 1967. The warrant of arrest was based on a sale of heroin al-

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*hereinafter abbreviated as TTP

leged to have occurred March 9, 1967 (Transcript of Motion to Suppress** page 7).

The arrest warrant had been secured by Federal agent, Henry Watson, at approximately 4:30 o'clock p.m. on March 30, 1967. (TMS 23). No request or attempt was made by the arresting officers at that time or any other time to procure a warrant to search the premises at 1402 East Granada or any other premises. The stated reason for not obtaining a search warrant was that in the opinion of the arresting officers there was no probable cause for the issuance of such a warrant to search the premises at 1402 East Granada (TMS 101).

Federal agent Watson and other arresting officers met in the Federal Building in Phoenix at approximately 8:00 o'clock p.m. on March 30, 1967, ostensibly for the purpose of discussing and planning the execution of the arrest warrant on Petitioner CLARENCE WILLIAMS. (TTP 53; TMS 25-29; 90-91; 303). According to the testimony of one of the arresting officers at the hearing on the motion to suppress prior to trial, the specific search of the premises at 1402 East Granada was also discussed and planned at this meeting (TMS 281-282).

Upon the arresting officers arriving at the Granada premises after midnight on March 31, 1967, and identifying themselves, they were admitted into the living room of the house by Arlene Jackson (TTP 13; TMS 34-36), who was a defendant in the original trial but whose conviction was reversed by the Court of Appeals. Petitioner CLARENCE WILLIAMS was immediately placed under arrest (TMS 36-37). Simultaneously with the arrest of Petitioner CLARENCE WILLIAMS, eight or nine officers without the consent of Petitioner (TMS 49), without a search warrant (TTP 54; 74; TMS 49) and without inquiring as to the ownership of the premises (TMS 39-40), began a systematic

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**hereinafter abbreviated as TMS

general search of the premises (TMS 38) lasting approximately two hours (TMS 159).

In the course of this search, one of the officers discovered a metal container (Exhibit #1) on the upper closet shelf of the northeast bedroom (TTP 62; 76). In this container, a quantity of heroin (Exhibit #3) was found (TTP 114). Petitioner WILLIAMS and Mrs. Jackson were subsequently tried and convicted of possesssion of this heroin.

In the closet and dresser of this same bedroom, officers observed articles of male and female clothing (TTP 65). The ownership of this clothing was never established (TTP 84-85), though Petitioner CLARENCE WILLIAMS in getting dressed to go to the police station did take certain items of clothing from the closet and dresser (TT 22; 33).

The Court of Appeals upheld the conviction of Petitioner WILLIAMS, finding that the *Chimel* rule did not apply to searches conducted before the date of the U.S. Supreme Court decision, that the search was valid under pre-Chimel standards and was not simply done under the pretext of an arrest, and that as to Petitioner WILLIAMS, there was sufficient evidence of constructive possession of the heroin to find him guilty beyond a reasonable doubt. The Court disagreed with the jury's verdict in regard to defendant Jackson, however, on the ground of lack of sufficient evidence of constructive possession, and directed her acquittal. (Appendix A).

SUMMARY OF ARGUMENT

I

It is the contention of Petitioner that the rule in *Chimel vs. California* should be applied retroactively, at least to the extent of covering cases such as this involving direct review of a Federal conviction not yet final at the time the *Chimel* decision was handed down. As will be stated below, logic as well as sound principles of Constitutional law and history dictate such a result.

The arguments attempting to justify a totally prospective effect to the *Chimel* decision are not persuasive in light of the history and reasons for the *Chimel* decision, and the weight of evidence is that failing to give at least a limited retroactive effect to *Chimel* will create more problems than would be avoided by contrary result in regard to the functioning of the courts and law enforcement agencies.

II

Even if *Chimel* is not given even a partially retroactive effect, other principles of law governing Supreme Court review of Federal criminal cases indicate that the conviction herein should be reversed because the arrest of Petitioner herein was a pretext for the search that was made and therefore the search was not merely incident to a lawful arrest to the extent permitted by pre-Chimel standards.

ARGUMENT

I

The Chimel Rule Should Be Applied Retroactively In This Case.

In the first place, there is no doubt that if the rule in *Chimel vs. California,* 395 U.S. 752, is applied to this case, then the instant conviction must be reversed. Since this case is one of possession of heroin, the conviction obviously cannot be sustained if the heroin is not available to be introduced into evidence. Clearly, the heroin was not found within the immediate reach or person of the Petitioner as shown by the uncontradicted statement of facts, but rather was found in a closet in a home allegedly belonging to Petitioner. Such heroin was discovered only after an extensive search of said home following the arrest of Petitioner on the arrest warrant referred to in the statement of facts. Clearly and undisputably, if the *Chimel* case applies, the search was illegal and the heroin could not properly be admitted and the case would have to be reversed and probably the indictment dismissed for lack of evidence.

Thus, the Court is faced squarely with the proposition of whether *Chimel* should be applied retroactively to cover this situation. It should be noted that the instant case is a Federal criminal appeal, and therefore none of the considerations of comity between Federal and state governments apply, nor should the Court be reluctant to reverse the lower court since no semi-sovereign state court or state legislation is involved. Furthermore, this case is not one of collateral attack on habeas corpus or otherwise, but is a case on direct review wherein there had not even been a decision of the Court of Appeals in regard to the appeal of the conviction at the time the *Chimel* rule was handed down. This, of course, distinguishes the case from the case of *Elkanich vs. United States,* (No. 1142) also to be decided this term, upon which certiorari was earlier granted.

If it were not for the recent case of *Desist vs. United States,* 394 U.S. 244, it would seem clear that the Petitioner's plea for reversal should be granted under the authority of *Linkletter vs. Walker,* 381 U.S. 618. However, a four member plurality opinion in the *Desist* case, over strong dissents and objections by three members of the Court, appeared to hold that re-interpretation of Fourth Amendment Constitutional protections would be applied totally prospectively in the future. The *Desist* case is the first case to so hold, and it is submitted that it is out of tune with other cases decided by this Court supported by larger numbers of the justices and by better reasoning. Petitioner urges this Court to reconsider the *Desist* opinion and the entire line of cases on the subject of retroactivity so that a consistent and valid Constitutional scheme may be arrived at.

In the latter regard, Petitioner would commend to the Court the exhaustive and well-reasoned memorandum of law in regard to the retroactive application of criminal procedure decisions of the Appendix to the Brief of the Petitioner in the case of *Elkanich vs. United States* (No. 1142), for which certiorari was earlier granted. Petitioner hereby incorporates said memorandum by

reference into this brief and suggests that it sets forth many salient arguments in favor of a reconsideration of the retroactivity question.

However, as stated above, the Court does not have to go that far in order to reverse this case. The Court does not have to decide that it will intrude upon the state courts in order to make its Constitutional decisions retroactive, nor does the Court have to decide, in order to reverse this case, that collateral attack on already-final Federal or state convictions will be allowed. All the Petitioner asks for here is that he not be precluded from receiving the benefits of the *Chimel* rule on his direct appeal because of arbitrary notions as to when his appeal was docketed in relation to that involved in the *Chimel* case.

It should be noted that in *Linkletter vs. Walker,* 381 U.S. 618, in which the Court denied the availability of collateral attacks upon already-final cases decided prior to *Mapp vs. Ohio,* 367 U.S. 643, this Court noted in passing that it was in effect beyond argument that *Mapp* would apply to cases still pending on direct review at the time that *Mapp* was rendered. It was noted that the Supreme Court had in fact, without even discussing or pondering the question, granted relief itself in three cases that had not been finally decided at the time of the *Mapp* ruling. See *Ker vs. California,* 374 U.S. 23, *Fahy vs. Connecticut,* 375 U.S. 85, and *Stoner vs. California,* 376 U.S. 483. The Court stated on page 627 of 381 U.S. that it clearly appeared "that a change in law will be given effect while a case is on direct review." This court indicated in the *Linkletter* decision that the only questionable area of law on the subject of retroactivity was as to collateral attacks on final judgments, since certain public policy questions arose in such situations that did not arise in cases of direct review.

It is true that in the *Desist vs. United States* case, supra, this Court indicated that it was not bound by the *Linkletter* rule providing for limited retroactivity, and declined to grant any

retroactivity at all to the new rule against wire tapping enunciated in *Katz vs. United States,* 389 U.S. 347. Petitioner herein finds it virtually impossible to distinguish the *Desist* case from the instant case, and therefore must ask this Court to reconsider its plurality opinion in *Desist* because of the principles enunciated herein and the dissenting opinions noted in said *Desist* case.

Most of the recent cases decided on the question of retroactivity set forth a three-pronged test to determine whether retroactivity should be granted. This test includes the purpose of the new Constitutional standard, the extent of reliance by the courts and law enforcement authorities on the old standards, and the effect on the administration of justice if the new standard is applied retroactively.

Analyzing the first standard, it is submitted that the purpose of the rule in *Chimel vs. California* is to rein in law enforcement officials violating the "reasonableness" standard of the Fourth Amendment. This is not a new doctrine, but is simply a restatement of a very basic old doctrine that even assuming probable cause for a search, the extent and nature of the search must be reasonable. The purpose of this standard is to protect the homes and property of all citizens of the country, both those guilty of crimes and those not guilty of crimes. Since all searches from the time of the Constitution are supposed to be reasonable and limited in scope to what is necessary, it would appear that the sooner that said reasonableness is carried out in actual practice, the better off will be all citizens of the country, since the strength of this country depends upon the observance of the Constitutional standards of freedom upon which this country was founded. No purpose is seen to be gained by delaying the application of the tighter rules of the old standard of reasonableness until some future date after all searches prior to June of 1969 have come up through the Court system. Since the purpose is to protect the rights of all citizens and not merely to deter law enforcement officers, the sooner that the rights of

citizens are given such full protection, all concerned will be better off.

In regard to the second argument, it is clear that any reliance on rulings of this Court prior to *Chimel vs. California,* in regard to the search of premises incident to an arrest, was misplaced. It should be noted that the case of *Weeks vs. United States,* 232 U.S. 383, established the basic principle that evidence obtained through unlawful search may not be utilized in Federal prosecutions. *Mapp vs. Ohio,* 367 U.S. 643, extended that doctrine to state prosecutions. The Constitutional lawfulness of searches under *Weeks* and *Mapp* depend on two general factors—whether the search was unreasonably broad and whether it was conducted with sufficient probable cause.

It must be emphasized that *Chimel* did not materially change the basic application of the Fourth Amendment, unlike the *Katz* case, which held that the Fourth Amendment applied to nontrespassory invasions of privacy, and other Constitutional decisions interpreting the Fifth and Sixth Amendments which established new areas of Constitutional protection. *Chimel,* by contrast, was simply an interpretation of the scope of the established rule that physical searches incident to arrest must not be unreasonably broad, and also part of the basic principle that evidence seized from a person or his residence may not be used against him if it is not obtained reasonably and with probable cause.

It should be noted that although the *Chimel* case overruled prior decisions of this Court, primarily *U.S. vs. Rabinowitz,* 339 U.S. 56, this does not mean that *Chimel* created a new principle of Constitutional law. Rather, *Chimel* was just one of a long list of cases decided by this Court each year refining and defining the meaning and scope of the *Weeks-Mapp* rule. For example, no one has suggested that *Spinelli vs. United States,* 393 U.S. 410, should not be applied retroactively, although it certainly sharply tightens the rules for probable cause for the issuance of a

search warrant. The point universally recognized is that *Spinelli* is nevertheless within the ambit of previous decisions of the Supreme Court setting forth the nature and definition of "probable cause", and therefore does not set forth a new Constitutional rule that should only be applied in the future.

Another important consideration herein is the fact that the *Rabinowitz* rule is the one that is out of harmony with the trend of Constitutional law if one decision be in that category. It is submitted that *Chimel* returned the law to where it was prior to the decision of *Rabinowitz* that seems out of context with the trend of Constitutional law. Prior to *Rabinowitz* in 1950, the Courts had repeatedly disallowed general searches incident to even a valid arrest, and the tenure of *Rabinowitz* was accentuated by sharp dissents both in the *Rabinowitz* case itself and subsequent cases in this Court and lower courts which followed it. In any event *Rabinowitz* announced no flat permissive rule. It specifically held that the recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. Certainly, prosecutors and police officials could not have relied upon such an uncertain and poorly-supported authority as a justification for general searches prior to the time of *Chimel.*

In regard to the last criterion, namely the effect on the administration of justice, it is submitted that the effect contended for by Petitioner herein would be small indeed. As noted above, Petitioner is asking only that retroactivity be extended to Federal criminal cases on direct appeal, a category which could not cover more than a few dozen cases. These are all cases wherein the defendants have not yet had their final day in court, and they certainly should be able to raise any issues permitted under existing Constitutional law to be raised. It is not a question of resuscitating evidence and witnesses long ago forgotten or lost, nor of attempting to free a person on the basis of Constitutional doctrines established 10 or 20 years after his

crime and conviction. Rather, a holding contrary to that sought by Petitioner would put a premium on timing by defense attorneys as to appeals. In short, if the attorney for Petitioner herein had been successful in securing this writ of certiorari during the last term of the Court, at the time that *Chimel* was decided, presumbably the instant case might have been the vehicle for the *Chimel* decision. Since his timing was not so accurate, his client is expected to serve the term in jail which would not otherwise be Constitutionally permitted under the *Chimel* rule. Such a system does not encourage respect for the administration of justice in any way whatsoever.

Although, as stated above, the *Desist* case is contrary to the doctrine contended herein, the Court's attention is called to the strong dissent by Justice Harlan therein, who pointed out that this Court had always held that it would make decisions retroactive when they were clearly foreshadowed by prior case law. Justice Harlan held that at a minimum, all new rules of Constitutional law must be applied to all cases still subject to direct review by the Court at the time of the new decision. He pointed out that it was unfair and unjudicial for a Court to pick and choose among defendants as to who would get the benefit of a new rule of Constitutional law. He indicated that was especially true when a case involved a Federal conviction, as in the instant case, rather than a rule imposed upon a defendant in a state court.

Even more cogent reasons for the retroactivity on direct appeal of *Chimel* were expressed by Justice Peters of the California Supreme Court in *People vs. Edwards*, 80 Cal. Rptr. 633, 458, P. 2d 713. Justice Peters, at Page 642 of 80 Cal. Rptr., says clearly that the *Chimel* rule should be retroactive to cases pending on direct appeal. He states:

> "In my view, the rule announced in Chimel applies to all pending cases. To hold that its rulings are purely prospective is an arrogant abuse of judicial power and a blatant exercise of legislative power. . . ."

Justice Peters points out that most of the arguments used in opposition to retroactivity are really attacks on the whole concept of the exclusionary rule, such as the argument that it is too late to deter police misconduct and that the guilty will go free. He states that the fundamental policies reflected by the *Mapp* ruling are frustrated by a prospective application rule. He states:

> "The immediate result of the refusal to apply Chimel to pending cases means that the Appellate and trial courts of this state will have a hand in the dirty business of securing convictions by the use of unlawfully obtained evidence. In these days, when so many people have taken to the streets in attacks upon our institutions and in defiance of the fundamental concepts of ordered liberty, it is more than ever necessary that a Court out of regard to its own dignity as an agency of justice and custodian of liberty strive to maintain that dignity, vindicate Constitutional rights, and encourage respect for a system of justice which does not sacrifice Constitutional rights for expediency. Yet we are told today that a trial court may convict Mr. Edwards and others on the basis of evidence seized in violation of Constitutional rights and, if so, Appellate Courts may affirm that conviction. Such a system lends no dignity to our court system and does not encourage respect for our institutions or our law."

Justice Peters pointed out that although the main purpose of the exclusionary rule is to deter improper police conduct, a rule applying the *Chimel* concept to cases presently on appeal will encourage rather than discourage that goal. He pointed out that it is essential that the police learn as soon as possible exactly what the limits of the *Chimel* rule are and all of its ramifications so that they may properly govern their conduct accordingly. He pointed out that if courts will not even consider the *Chimel* rule on pending cases, but must wait until new cases climb up through the appellate process, it will take years for case law to come down construing the ramifications of *Chimel* and applying standards for the police to use. In the interim, the police still will have to take their chances on the proper interpretations

and application of *Chimel* in cases not specifically covered by its exact holding, and the result may be to free additional criminals because of an illegal search when their post-Chimel searches finally come up for direct review a few years hence. Answering the argument that applying *Chimel* retroactively would hinder the administration of justice, Peters commented:

> "In any event, when the relatively few pending cases are weighed against the numerous searches which officers will conduct during the period when the Courts of this state refuse to consider the rules established by Chimel, it is apparent that the pending cases are merely the tip of the iceberg and furnish no justification to ignore its base. The business and sole justification for the Courts is declaring the law and determining controversies, and the possibility that the load of the Courts will be lightened does not warrant a refusal to declare or protect Constitutional rights. Such rights rest on no such uncertain grounds."

Justice Peters touches on another point referred to earlier by Justice Harlan, in regard to the fact that the *Chimel* rule had been foreshadowed by other cases. In other words, it is simply not true that police officers prior to *Chimel* had a full and complete right to rely upon the assumption that they could make any type of search that they wanted following an arrest without a search warrant. Justice Peters points out:

> ". . . Both the majority and the dissent in *Chimel* recognize that the United States Supreme Court had taken vacillating and somewhat inconsistent positions as to the permissible scope of a search incident to an arrest. As the majority there pointed out, a search of an entire home as incident to an arrest therein is not 'supported by a reasoned view of the background and purpose of the Fourth Amendmnet' and that it would be possible to distinguish such a search from prior cases by the Court . . . . As recognized by *Chimel* and by *United States vs. Rabinowitz*, 339 U.S. 56, 70 S. Ct. 430, the main case overruled by *Chimel*, the reasonableness of searches depends on the facts and circumstances, and the Courts have not been consistent in determining what princi-

ples are to be applied in determining reasonableness. *Chimel* establishes that reasonableness is to be determined by viewing the facts and circumstances in the light of established Fourth Amendment principles. Certainly this is not new law."

Justice Peters notes that Supreme Court Justice White pointed out in his dissenting opinion in *Chimel* that to go beyond the search of an arrested man and of the items within his immediate reach, there must be "probable cause to believe that seizable items are on the premises." As was pointed out in the statement of facts above, it is the contention of Petitioner herein that the weight of the factual evidence is that there was no probable cause to believe that there were drugs in the house of the Petitioner even apart from the fact that there was no warrant for the search of his house. Referring to the *Chimel* case itself, the majority opinion points out that numerous cases from the U.S. Supreme Court had shown that the right to search upon execution of an arrest warrant is not limitless. Among the cases cited for that view was *Trupiano vs. United States,* 334 U.S. 699, 68 S. Ct. 1229, *McDonald vs. United States,* 335 U.S. 451, 69 S. Ct. 191, *Agnello vs. United States,* 269 U.S. 20, 46 S. Ct. 4, *United States vs. Jeffers,* 342 U.S. 48, 72 S. Ct. 93, *Terry vs. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, *Preston vs. United States,* 376 U.S. 364, 84 S. Ct. 881, and *Sibron vs. New York,* 392 U.S. 40, 88 S. Ct. 1889. At footnote 15 on Page 2042 of the Supreme Court Reporter citation, the U.S. Supreme Court gives a long list of cases which it states shows that *Harris vs. U.S.,* 331 U.S. 145, 67 S. Ct. 1098, and *U.S. vs. Rabinowitz,* the cases overruled by *Chimel,* have been relied upon less and less in the court's own decision. See also *U.S. vs. Kirschenblatt,* 16 F.2d 202 (Second Circuit).

In summary, therefore, it is submitted that even using the criteria developed by this Court in recent years to determine whether or not Constitutional decisions should be applied retroactively, that at least limited retroactivity to the extent contended for here should be granted to the *Chimel* decision based on a

proper interpretation of its purposes, its historical role and importance as a Constitutional decision, the extent of its reliance in the past, and the effect on the administration of justice.

II

The Arrest of the Petitioner Was a Mere Pretext to Carry Out A General and Exploratory Search Incidental to the Arrest.

The arresting officers in this case based the search of the premises where the arrest was made on the fact that it was made incidental to a lawful arrest (TMS 38). Even if the arrest warrant was valid, nevertheless the Petitioner contends that the search itself was a primary motive for the officers being at the Granada premises at that time, and therefore even if *Chimel* does not apply, the search was not reasonably incident to a lawful arrest and is therefore invalid. The arresting officers, knowing that they did not have probable cause to obtain a search warrant (TMS 101), used the arrest as a vehicle to circumvent the requirements of obtaining a search warrant. Thus the Petitioner submits that the search was not incidental to the arrest but that rather the arrest was incidental to the search.

On March 9, 1967, some three weeks before the arrest and search in question, Petitioner CLARENCE WILLIAMS is alleged to have sold heroin to a Federal narcotics agent (TMS 7). In the interim between March 9, and March 30, 1967, Petitioner was kept under surveillance as was the Granada residence (TMS 12-18; 81-83). There is no evidence that known narcotics dealers or users were observed going to or from the home during this period (TTP 41).

About four hours after the issuance of the arrest warrant for the Petitioner, a meeting of Federal, State and City officers was called at the Federal Building in Phoenix, in connection with the issuance of the arrest warrant. Approximately a dozen officers attended that meeting, (TTP 53; TMS 25-29; 243). Although

the ostensible reason for the meeting was to plan the execution of the arrest warrant that night, Petitioner alleges that in fact the primary purpose behind the meeting was the specific planning of the general exploratory search of the Granada premises. Robert Gutierrez, a City of Phoenix police officer, who was present at said meeting and also participated in the search at the place where Petitioner was arrested, testified that he was instructed at the meeting to assist Federal, State and City officials in carrying out a search of the Granada premises (TMS 281-282).

In *United States vs. James,* 378 Fed.2d 88 (6th Cir. 1967), approximately ten officers met at police headquarters before going to the appellant James' residence to serve an arrest warrant for a narcotics violation. The officers were assigned specific areas of the residence to search. After the arrest, a vacuum cleaner containing narcotics was found in a bedroom closet. The 6th Circuit Court in reversing appellant James' conviction for possession of narcotics and in agreeing with the appellant's contention that her arrest was a mere pretext to make the search, said:

> "Taking into account all of the admitted facts and circumstances of the case, including the large aggregation of agents and police officers, it seems to us that the agents and officers were interested in something more than merely making an arrest. It is clear that their primary purpose was to make a general exploratory search of the apartment with the hope of finding narcotics. This search in our judgment was unreasonable and violated the rights of Appellant James under the the Fourth Amendment to the Constitution. United States vs. Harris, 321 F.2d 739 (6th Cir. 1963)." (Pp. 90-91)

In *Amador-Gonzales vs. United States,* 391 F.2d 308 (5th Cir. 1968), the Appellate Court, in declaring a search incidental to a lawful arrest for a traffic violation to be illegal, said:

> "The rationale for the search incident to arrest exception is the historical right of an arresting officer to search the place of arrest and the practical consideration that once an arrestee's privacy is invaded by his being placed in lawful custody, there is little or no additional invasion in searching

him or the immediate surroundings which the police have entered to effect the arrest. Again, however, fidelity to the Fourth Amendment commands that the exception not engulf the rule. The lawfulness of an arrest does not always legitimate a search. General or exploratory searches are condemned even when they are incident to a lawful arrest. United States vs. Rabinowitz, 339 U.S. 62, . . . The arrest must not be a mere pretext for an otherwise illegitimate search. Henderson vs. United States, 4 Cir. 1926, 12 F.2d 258, . . .; Worthington vs. United States, 6 Cir. 1948, 166 F.2d 557; McKnight vs. United States, . . . , 183 F.2d 977; United States vs. Harris, 6 Cir. 1963, 321 F.2d 739; Taglavore vs. United States, 9 Cir. 1961, 291 F.2d 262." (Page 313)

In the *James* case, supra, the arresting officers had information that appellant James had used the searched residence as a place of business for the distribution of narcotics up to the date of the arrest.

As set forth above, in the instant case, there was no showing whatever of any connection between the Granada premises and the crime of the sale of heroin for which the arrest warrant was issued. Therefore, the appellant contends that the absence of any probable cause makes the use of an arrest warrant as a means to conduct a search incidental to an arrest even more of an unwarranted pretext than it was in the *James* case, supra.

It is further submitted that the companion cases to *Chimel, Von Cleef vs. New Jersey,* 395 U.S. 814, 89 S. Ct. 2051, and *Shipley vs. California,* 395 U.S. 818, 89 S. Ct. 2053, indicate that this search was not lawful even under pre-Chimel standards. These companion cases which did not apply *Chimel* applied the old rules of *U.S. vs. Rabinowitz,* 339 U.S. 56, 70 S. Ct. 430 and *Harris vs. United States,* 331 U.S. 145, 67 S. Ct. 1098.

In *Rabinowitz,* the place of search was a business room to which the public was invited. The room was small and under the immediate and complete control of the one arrested. In the instant case the place searched was a private residence. The article in question was seized from a bedroom shelf after the

defendants were arrested in another room of the residence. And of crucial importance, the record shows that the arresting officers had made no determination before the search of the ownership of the residence, nor of the ownership of clothing found in the same bedroom.

In *Harris,* the one arrested was in exclusive possession of a four-room apartment. Moreover, the police there, after making the arrest, were specifically looking for two cancelled checks which were thought to be the means and instrumentality used in the crime for which the petitioner there was arrested.

In the instant case, again, the arresting officers did not and could not establish that the defendants were in exclusive possession of the rooms searched. And unlike *Harris,* the police in the instant case already had in their hands the means used in the crime charged, namely, a quantity of narcotics from a previous sale.

The court in *Harris* stated: "Nor is this a case in which law enforcement officers have entered premises ostensibly for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime." (331 U.S. at p. 153; 67 S. Ct. at p. 1102).

In the instant case, the Petitioner contends that the arresting officers did discuss the search of the residence in question *before* the search. The use of eight or nine officers in the arrest tends to confirm a real purpose of making a general exploratory search.

Mr. Justice Frankfurter, in his dissenting opinion in *Harris,* said: ". . . There was no search warrant, no crime was 'openly being committed in the presence of officers; the seized documents were not 'in plain view or picked up by the officers as an incident of the arrest. Here a 'thorough search was made without a warrant." (331 U.S. at p. 169; 67 S. Ct. at p. 1110).

None of the circumstances found lacking in *Harris* by Mr. Justice Frankfurter are present in the instant case.

In *Shipley,* supra, the police arrested the petitioner outside his house and then searched the house. The fact situation, therefore, can be distinguished from that of the instant case, where the appellants were arrested inside a private residence.

But the Supreme Court pointed out in *Chimel,* supra, that had the petitioner there been arrested earlier in the day at his place of business, no search could have been made in his house without a search warrant.

In *Chimel,* supra, the police searched the petitioner's three-bedroom house pursuant to an arrest warrant after the petitioner was arrested inside the house. Thus, the fact situation is very close, if not congruent, with that of the instant case.

The Court in *Chimel* held the search of the whole house unlawful. The Court said:

> "There is ample justification, therefore, for search of arrestee's person and area 'within his immediate control' construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. There is no justification, however, for routinely searching rooms other than that in which an arrest occurs or, for that matter, for searching throughout all desk drawers or other closed or concealed areas in that room itself." (89 S. Ct. at p. 2040).

Even without retroactive application of *Chimel,* however, the Petitioner contends that the search in question violated the limiting standards of pre-Chimel law. Not only did the search in the instant case go beyond *Rabinowitz* and *Harris,* as argued above, but the Court in *Chimel* pointed out that *Rabinowitz* and *Harris* have been relied upon less and less in the Court's decisions.

Furthermore, in *Chimel,* the Court referred to its previous decision in *Sibron vs. New York,* 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). In *Sibron,* a policeman had put his hand in the suspect's pocket for the purpose of finding narcotics. The Court held that search to be unlawful where it was made for a purpose other than protection of the police officer. The Petitioner

contends that the search in the instant case was manifestly for a purpose other than protection of the arresting officers.

Therefore, in summary on this point, it is contended that even if *Chimel* is not expressly made retroactive to apply to the instant case, that under the standards enunciated by this Court and other courts before *Chimel,* properly interpreted, the search herein was improper either because it was generally too broad in violation of the Fourth Amendment requirement as to reasonableness, or because the arrest was merely a pretext to justify a search which could not otherwise have been carried out because of the lack of probable cause in advance for such a search.

CONCLUSION

It is respectfully submitted that the decision below against the Petitioner should be reversed and the case remanded for further proceedings consistent with the holding that the decision in *Chimel* is applicable to Petitioner's case. This is necessary because of the premises above as to the need to apply *Chimel* retroactively at least on a limited basis and the fact that under no circumstances, regardless of the application of *Chimel,* can the search in question be justified under the plain reading of the Fourth Amendment requirement of reasonableness.

Respectfully submitted,

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APPENDIX "A"

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE WILLIAMS *and*
ARLENE JACKSON,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Nos. 22871
22870

Appeal from the United States District Court
for the District of Arizona

Before: BROWNING, CARTER, and HUFSTEDLER, Circuit Judges

HUFSTEDLER, Circuit Judge:

Williams and Jackson were jointly tried and each was convicted for concealing illegally imported heroin in violation of 21 U.S.C. § 174.[1] Both of them appeal, raising the issues: (1) Did the District Court err in denying their motions to suppress the heroin as the product of an illegal search? (2) Did the District Court err in denying their motions for acquittal based upon the

[1] 21 U.S.C. § 174 provides in pertinent part: "Whoever . . . conceals . . . any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than five or more than twenty years . . . .

"Whenever on trial for a violation of this section the defendant is shown to have had or to have possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

insufficiency of the evidence to sustain the jury's implied finding of possession?

We hold: (1) The search was not illegal because Williams' arrest was not as a matter of law a pretext for the warrantless search and because the rule of *Chimel v. California* (1969) 395 U.S. 752 does not apply to searches conducted before June 23, 1969, the date of the *Chimel* decision; (2) the evidence was insufficient to support Jackson's conviction; and (3) the evidence was sufficient to support Williams' conviction.

Legality of the Search

Jackson and Williams contend that the heroin was the product of an illegal search because Williams' arrest was a pretext for a warrantless search of the Granada Street residence in which he was arrested and because the scope of the search went beyond that properly incident to the arrest.

The Government had probable cause to believe that Williams was a party to a sale of heroin on March 9, 1967. He was not then arrested, but he was kept under surveillance by federal and state law enforcement officers to try to find out the source of the narcotics. On March 30, 1967, federal narcotics agent Watson obtained a warrant for Williams' arrest for the sale on March 9. Federal, state, and city officers met at the Federal Building in Phoenix, Arizona, about 8:00 p.m. on March 30 for the purpose of planning the execution of the arrest warrant. There is a conflict in the evidence as to whether a search of the Granada Street residence was discussed at that meeting. Police Officer Gutierrez testified that the residence search was discussed and planned. Other law enforcement officers testified that there was no discussion about searching the Granada Street residence.

After the meeting, the officers circulated in various locations known to be frequented by Williams. During the period from 5:50 p.m. to 11:40 p.m. defendant Williams was constantly on the move. It was not until he returned to the Granada residence shortly before midnight that the officers located him. Shortly

after midnight eight officers entered the residence to arrest Williams. Williams was discovered in the living room. The search began almost immediately and lasted for about one hour and forty-five minutes. Federal agent Watson testified that they were looking for contraband, in particular, narcotics, and for Government money which had been used to purchase narcotics.

Defendant Williams contends that this evidence shows that "the arresting officers, knowing they did not have probable cause to obtain a search warrant [for the Granada residence], used the arrest as a vehicle to circumvent the requirements of obtaining a search warrant." The Government agrees than an arrest may not be used as a pretext to search for evidence without a search warrant where one would ordinarily be required under the Fourth Amendment.

Whether or not an arrest is a mere pretext to search is a question of the motivation or primary purpose of the arresting officer. Improper motivation has been found where the arrest is for a minor offense which serves as a mere "sham" or "front" for a search for evidence of another unrelated offense for which there is no probable cause to arrest or search. (*See Amador-Gonzales v. United States* (5th Cir. 1968) 391 F.2d 308; *Taglavore v. United States* (9th Cir. 1961) 291 F.2d 262.) It has also been found where the arresting officer deliberately delays making the arrest in order to allow the arrestee to enter the premises which the officer desires to search. (*Compare McKnight v. United States* (D.C. Cir. 1950) 183 F.2d 977 *with United States v. Weaver* (4th Cir. 1967) 384 F.2d 879, *cert. denied* (1968) 390 U.S. 983.)

There is ample evidence to sustain the District Court's finding that the arrest was not a pretext for the search. The search for contraband was related to the nature and purpose of the arrest. The delay in obtaining the arrest warrant was justified by the quest for more evidence and by the investigation to ascertain the source of the narcotics. The officers proceeded with due dili-

gence to execute the warrant after it was issued by serving Williams wherever he could be found. There is no evidence that the officers deliberately passed up an earlier opportunity to arrest Williams on the warrant. We cannot hold as a matter of law on this record that the primary purpose of executing the warrant upon Williams when he returned to the Granada residence was to search that house. (*Compare United States v. Costello* (2d Cir. 1967) 381 F.2d 698 *with United States v. James* (6th Cir. 1967) 378 F.2d 88.)

Williams was arrested in the living room of the Granada residence. Following his arrest ,the officers searched the whole house. The heroin was found in a container on a closet shelf in the northeast bedroom. *Chimel v. California, supra,* held that a search of the house in which a defendant is arrested is no longer within the bounds of a search incident to an arrest and that the constitutional perimeter of such a search is the person of the arrestee and the area "within his immediate control." (395 U.S. at 763.) The Williams search is illegal under the *Chimel* standard, and the heroin should have been excluded from the evidence if the *Chimel* rule applies retroactively to searches conducted before June 23, 1969.

The Supreme Court has expressly left open the question of *Chimel's* retroactivity. *Shipley v. California* (1969) 395 U.S. 818; *see also Von Cleef v. New Jersey* (1969) 395 U.S. 814.) However, in *Desist v. United States* (1969) 394 U.S. 244, the Court reiterated the guidelines for determining retroactivity of a new constitutional rule first stated in *Linkletter v. Walker* (1965) 381 U.S. 618:

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." (394 U.S. at 249.)

The Court in *Desist* said the foremost of the three criteria was

the first. If the purpose is to deter misconduct of police officers in conducting a search, the new exclusionary rule will not be given retrospective effect because that purpose is not advanced by penalizing conduct that has already occurred. The exclusionary rule in such cases, the Court observed, was a procedural device to curb illegal police action and not a rule affecting the integrity of the process for finding the innocence or guilt of an accused.

We are unable to see any meaningful difference between the purpose or the effect of the exclusionary rule announced in *Katz v. United States* (1967) 389 U.S. 347, affecting the admissibility of evidence obtained by electronic eavesdropping, and the exclusionary rule announced in *Chimel,* affecting the admissibility of evidence obtained by a search not reasonably incident to an arrest. We conclude, therefore, that the rule of retroactivity stated in *Desist* with respect to *Katz* applies in full measure to *Chimel.* Accordingly, we hold that the rule of *Chimel* applies only to those searches claimed incident to an arrest, conducted after June 23, 1969.[2]

The legality of the search incident to Williams' arrest is controlled by the pre-*Chimel* standards stated in *United States v. Rabinowitz* (1950) 339 U.S. 56 and *Harris v. United States* (1947) 331 U.S. 145: Was the search reasonable under the totality of the circumstances? We think it was. The arrest was for the sale of heroin, and the object of the search was the discovery of the contraband and of the Government money used to purchase heroin. As in *Harris,* the nature of the fruits of the crime makes it likely that "they would have been kept in some secluded spot." The search covered the house in which Williams was found and in which he gave every appearance of residing. The

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[2] The same result has been reached by the fifth Circuit in Lyon v. United States (1969) F.2d [No. 26190, Sept. 4, 1969], the Second Circuit in United States v. Bennet (1969) F.2d [No. 32327, Sept. 9, 1969], and by the California Supreme Court in People v. Edwards (1969) Cal. 2d [No. 12872, Sept. 23, 1969].

search was not of an area more extensive than that permitted in *Harris*.

Sufficiency of the Evidence

The Government's case against both Jackson and Williams rested exclusively upon the presumption from proof of possession stated in section 174. It was therefore incumbent upon the Government to prove beyond a reasonable doubt that each defendant possessed the heroin.

The Government had to prove that each defendant was in constructive possession of the heroin, because neither defendant had actual possession of the narcotic. One has constructive possession of contraband if he knows of its presence and has power to exercise dominion and control over it. (***Figueroa v. United States 9th Cir.*** 1965) 352 F.2d 587; ***Arellanes v. United States*** (9th Cir. 1962) 302 F.2d 603, ***cert denied*** (1962) 371 U.S. 930; ***Hernandez v. United States*** (9th Cir. 1962) 300 F.2d 114.)

Here is the evidence bearing upon the possession issue: When the federal narcotics agents rapped on the door of the Granada residence shortly after midnight on March 31, 1967, Jackson answered the door and admitted the officers. She was fully clothed. The agents walked into the living room and placed Williams under arrest. He was sitting on a sofa in the living room eating a meal from a tray and watching television. He was wearing underware, a robe, and slippers. After his arrest, Williams went to the northeast bedroom and dressed himself in clothing he took from the closet and the dresser in that room. Both the closet and dresser contained men's and women's apparel. The heroin was later discovered on the shelf of the closet from which Williams took some of his clothes.

Before the night of Williams' arrest, the Granada house had been placed under surveillance. Jackson has been seen either entering or leaving the house on four or five occasions. There was no evidence that the women's apparel in the northeast bed-

room was hers. There was no evidence that she owned or rented the house, or that Williams did so. Jackson's relationship, if any, to Williams was not proved.

To sustain the jury's finding of Jackson's guilt, we would have to decide that from the facts that she was in the house after midnight, that she had been seen entering and leaving the house on several prior occasions, and that there was feminine apparel in the northeast bedroom, the jury could reasonably have concluded that she was living in the house and sharing Williams' bedroom, that she had at least joint power to control the closet and its contents, and that she knew the heroin was there. Futher, we would have to be satisfied that the jury could have reached those conclusions free from any reasonable doubt, *i.e.*, that kind of doubt " 'that would make a person hesitate to act' in the more serious and important affairs of his own life." (*United States v. Nelson* (9th Cir. 1969) F.2d , quoting in part, from *Holland v. United States* (1954) 348 U.S. 121, 140.) The evidence against Jackson does not rise to that standard, and the case against her collapses.

The evidence of Williams' possession is very different from that of Jackson's. Williams was obviously at home in the Granada residence. He used clothes from the closet in which the heroin was found. He could have reached for the heroin as easily as he reached for his coat. The only ingredient of constructive possession which had to be proved circumstantially was his knowledge of the presence of the heroin. The jury could properly conclude that it was more probable than not that he had the requisite knowledge. From the presence of feminine apparel in the same closet, an inference can be drawn that a woman had access to the closet. But that inference does not contradict the inference that Williams knew that the heroin was in his closet and we cannot say that the inference is so strong as to raise a reasonable doubt that Williams did not know the contraband was there.

The judgment against Jackson is reversed. The judgment against Williams is affirmed.

APPENDIX "B"

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE WILLIAMS, Appellant, v. UNITED STATES OF AMERICA Appellee.	No. 22871 ORDER

Before: BROWNING, CARTER, and HUFSTEDLER, Circuit Judges

Appellant-petitioner is remitted to his remedy under 28 U.S.C. § 2255 to pursue his claim that the testimony of one of the Government's witnesses was perjured.

The petition for rehearing is denied.

/s/ SHIRLEY HUFSTEDLER
Shirley Hufstedler, Circuit Judge